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In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 28

UNITED STATES OF AMERICA, PETITIONER

v.

GIACOMO VENTRESCA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the court of appeals (R. 28–38) is reported at 324 F. 2d 864. The opinions of the district court denying the motions to suppress (R. 15–18, 18–19) are not reported.

JURISDICTION

The judgment of the court of appeals was entered on November 26, 1963 (R. 38). By order of Mr. Justice Clark, dated December 24, 1963, the time for filing a petition for a writ of certiorari was extended to and including January 25, 1964 (R. 39). The petition for a writ of certiorari was filed on January 23, 1964, and granted on June 22, 1964 (R. 40). The

jurisdiction of this Court rests upon 28 U.S.C. 1254 (1).

QUESTION PRESENTED

An affidavit for a search warrant, sworn to by an Investigator of the Alcohol and Tobacco Tax Division of the Internal Revenue Service, contained a detailed recital of facts establishing probable cause to believe that an illegal still was being operated on certain premises. The introductory paragraph of the affidavit stated that the affiant's information was "[b]ased upon observations made by me, * * * information received officially from other Investigators attached to the Alcohol and Tobacco Tax Division assigned to this investigation, and reports orally made to me describing the results of their observations and investigation * * *." The concluding paragraph of the affidavit further stated that the recited information was "based upon personal knowledge and information which has been obtained from Investigators of the * * * Division * * * who have been assigned to this investigation." Relying on the quoted language, the court below held (1) that all of the information recited in the affidavit may have been gathered by Investigators other than the affiant and may thus have been hearsay, and (2) that such information may in turn have been gathered entirely by unreliable informants. On the basis of the conclusion that the entire affidavit may thus have been based upon unreliable hearsay, the court held that probable cause for the issuance of a warrant had not been established.

The question presented in whether the affidavit did, in fact, establish probable cause.

CONSTITUTIONAL PROVISION AND RULE INVOLVED

The Fourth Amendment to the Constitution of the United States provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Rule 41 of the Federal Rules of Criminal Procedure provides in pertinent part:

> (a) Authority to Issue Warrant. A search warrant authorized by this rule may be issued by a judge of the United States or of a state, commonwealth or territorial court of record or by a United States commissioner within the district wherein the property sought is located. * * *
>
> (b) Grounds for Issuance. A warrant may be issued under this rule to search for and seize any property
>
> * * * * *
>
> (2) Designed or intended for use or which is or has been used as the means of committing a criminal offense; * * *
>
> * * * * *
>
> (c) Issuance and Contents. A warrant shall issue only on affidavit sworn to before the judge or commissioner and establishing the grounds for issuing the warrant. If the judge or commissioner is satisfied that grounds for the application exist or that there is probable cause to believe that they exist, he shall issue a warrant identifying the property and naming

or describing the person or place to be searched. * * *

* * * * *

(e) Motion for Return of Property and to Suppress Evidence. A person aggrieved by an unlawful search and seizure may move the district court for the district in which the property was seized for the return of the property and to suppress for the use as evidence anything so obtained on the groud that * * * (4) there was not probable cause for believing the existence of the grounds on which the warrant was issued * * *.

* * * * *

STATEMENT

Respondent was tried by a jury in the United States District Court for the District of Massachusetts under indictments charging him with possession and operation of an illegal distillery [1] and conspiracy.[2] He was convicted on all counts and sentenced to imprisonment for a total of three years (R. 25). The conviction was reversed by the Court of Appeals for the First Circuit (one judge concurring, one judge dissenting) on the ground that the affidavit supporting the application for a search warrant (in execution of which the still was found) had been insufficient to establish probable cause (R. 28–38).

The affidavit upon which the warrant was issued (R. 4–8) was made and submitted to a Commissioner on August 31, 1961, by Walter Mazaka, an Investiga-

[1] 26 U.S.C. 5171(a), 5173(a), 5602, 5179(a), 5222(a)(1), 5205(a)(2), 5686, and 5681(a).

[2] 18 U.S.C. 371.

tor for the Alcohol and Tobacco Tax Division of the Internal Revenue Service. He stated that he had reason to believe that an illegal distillery was in operation in respondent Ventresca's home at 148½ Coburn Avenue in Worcester, Massachusetts. The grounds for this belief were set forth in detail on an attached sheet (R. 5–8), prefaced with the following statement:

> Based upon observations made by me, and based upon information received officially from other Investigators attached to the Alcohol and Tobacco Tax Division assigned to this investigation, and reports orally made to me describing the results of their observations and investigation, this request for the issuance of a search warrant is made.

The sheet then set forth seven different occasions between July 28 and August 30, 1961, when a Pontiac car was driven into the yard to the rear of Ventresca's home in Worcester. The car was identified as being owned and driven by Joseph Garry with Joseph Incardone as passenger. On four occasions the car carried loads of sugar in sixty-pound bags (July 28, August 7, August 16, August 24); on two occasions it carried empty tin cans (August 11, August 28); and on one occasion it was merely observed as being heavily laden (August 7). On three of these occasions (July 28, August 7, August 11) Garry and Incardone had been seen loading the car. On two occasions (August 16 and August 24) Garry and Incardone were observed arriving at Garry's home at about midnight, after having left Ventresca's house.

They removed five-gallon cans from the trunk of Garry's car and carried the cans—which appeared to be filled—into Garry's home two at a time. On August 28, after a delivery of empty tin cans to Ventresca's house, Garry and Incardone were seen carrying cans which appeared to be filled from the house and placing them in the trunk of Garry's car. With regard to all of the foregoing observations, the persons making the observations were not specified.

In two additional paragraphs relating to August 18 and August 30, the sheet stated that "Investigators" smelled the odor of fermenting mash as they walked along the sidewalk in front of the premises at 148½ Coburn Avenue at approximately 4:00 a.m. On August 18 they heard, "[a]t or about the same time," "certain metallic noises which cannot be further identified by source or sound" (R. 7). On August 30, the day before the warrant was applied for, they heard (as they smelled the mash) "sounds similar to that of a motor or a pump coming from the direction of 148½ Coburn Avenue" (R. 8).

The sheet attached to the affidavit concluded:

> The foregoing information is based upon personal knowledge and information which has been obtained from Investigators of the Alcohol and Tobacco Tax Division, Internal Revenue Service, who have been assigned to this investigation.

The district court upheld the validity of the warrant on a motion to suppress (R. 15–19). However, the court of appeals (Hartigan, J.) held the warrant invalid (R. 28–36). On the basis of the intro-

ductory and concluding statements on the sheet attached to the affidavit, the court reasoned (1) that all of the information recited in the affidavit may have been gathered by Investigators other than affiant Mazaka and (2) that there was no way to be sure that the information of these other Investigators was not in turn based upon hearsay received from unreliable informants. Because Mazaka could not vouch for the reliability or trustworthiness of the sources of information which thus might have been used by other Investigators, the court found that probable cause had not been established under *Jones* v. *United States,* 362 U.S. 257. Judge Aldrich concurred (R. 36–37) and Chief Judge Woodbury dissented (R. 37–38).

SUMMARY OF ARGUMENT

Upon a fair reading, the affidavit in this case established probable cause for the issuance of the search warrant. The affidavit showed that, before applying for a warrant Investigators of the Alcohol and Tobacco Tax Division of the Internal Revenue Service conducted a month-long investigation during which they gathered considerable circumstantial evidence showing the operation of an illegal still at respondent's residence. The affiant swore, moreover, that the warrant was applied for only after Investigators, for the second time, smelled the odor of fermenting mash at respondent's premises and heard the sound of a pump or motor.

The court of appeals reached the opposite result only by interpreting the affidavit wholly against the

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purposes of the document, much as pleadings were strictly construed against the pleader at common law. Not only is such an approach inappropriate as applied to affidavits customarily composed by non-lawyers, but it would, if approved, tend to disparage the safeguards created by the Fourth Amendment. There are many reasons why searches with warrants are, where possible, constitutionally preferable to searches undertaken without prior impartial scrutiny of the cause to search. Although searches may legitimately be undertaken without warrants in limited circumstances, it is therefore vitally important to encourage, rather than discourage, resort to warrants. Approval of the decision below, which unreasonably frustrated responsible police efforts culminating in an application for a warrant rather than in an attempt to search without a warrant, would only tend to encourage police to avoid the use of a warrant wherever possible. A principal safeguard of the Fourth Amendment would thereby be weakened.

ARGUMENT

The affidavit of Investigator Mazaka reveals that a search warrant was applied for in this case only after Mazaka and other Investigators of the Alcohol and Tobacco Tax Division of the Internal Revenue Service had engaged in a careful month-long investigation of respondent Ventresca's residence. The affidavit shows that the Division's investigation included frequent surveillance of Ventresca's home, as well as the surveillance and tracing of automobiles going to and from the home. Considerable circumstantial evidence of

an illegal still within Ventresca's premises was thus uncovered. Finally, the warrant was applied for the day after Investigators, for the second time, smelled the odor of fermenting mash at the house. In short, the affidavit plainly revealed that the search warrant was applied for after a fully responsible police investigation had provided a firm basis for believing that an illicit still was located in Ventresca's home. The affidavit was therefore plainly sufficient.

The court of appeals, however, has found that, since the affidavit did not explicitly negate the possibility that the information related in it may have been gathered by unreliable informants who were not official full-time Investigators of the Alcohol and Tobacco Tax Division, the affidavit must be assumed to be wholly based upon such unreliable information. The court held that the affidavit was therefore insufficient to establish probable cause. We submit that the construction of the affidavit offered by the court of appeals was plainly wrong. We submit further that the court's attitude toward the interpretation of the affidavit would, if approved, tend to defeat substantial justice in criminal proceedings. Perhaps even more important, it would penalize and frustrate conscientious officers who properly apply for warrants at the culmination of their investigations by subjecting them to hypertechnical requirements, albeit they have carefully sought to follow the constitutional and statutory procedures and have scrupulously observed every substantial right of the persons suspected.

I

THE AFFIDAVIT ESTABLISHED PROBABLE CAUSE

1. If the events related in the sheet attached to Investigator Mazaka's affidavit were, in fact, observed as they took place, they unquestionably established probable cause to search for and seize an illegal still upon respondent Ventresca's premises. The affidavit recounted frequent deliveries of large quantities of sugar in sixty-pound bags to Ventresca's house, deliveries of empty tin cans to the house, and of full cans from it. These events alone created strong circumstantial suspicion of the operation of an illegal still. Issuance of a warrant plainly became justified when, on August 30 (the day before the warrant was applied for), the odor of fermenting mash was for the second time detected by investigators at Ventresca's house, accompanied on this occasion by the sound of a motor or pump. See *Garhart* v. *United States,* 157 F. 2d 777 (C.A. 10). Indeed, a qualified officer's detection of the smell of mash would alone have supported the issuance of a search warrant in this case. *Monnette* v. *United States,* 299 F. 2d 847, 850 (C.A. 5); *Steeber* v. *United States,* 198 F. 2d 615, 616, 618 (C.A. 10); *United States* v. *Kaplan,* 89 F. 2d 869 (C.A. 2); *United States* v. *Seiler,* 40 F. Supp. 895 (D. Md.). See *Chapman* v. *United States,* 365 U.S. 610, 615; *Johnson* v. *United States,* 333 U.S. 10, 13. Suffice it to say that the court of appeals, although ultimately finding no probable cause, made no suggestion whatsoever that the observations related in the affidavit would not, if believed, have established probable cause.

2. The court of appeals, however, found the reported observations to be unreliable and not entitled to belief. Its first basis for this holding was its conclusion that it was compelled to deem all of the observations embodied in the affidavit as constituting hearsay. The court seems to have relied here upon Mazaka's statements in the introductory and concluding paragraphs of the sheet attached to the affidavit—on which the result of the investigation was set forth in detail—that the information set forth had been "received officially from other Investigators" and "obtained from Investigators * * * assigned to this investigation" as well as being based upon "observations made by me" and "personal knowledge" (R. 5, 8). In the court's view, at least some of the facts alleged were therefore hearsay and since the "affidavit failed clearly to indicate which of the facts * * * were hearsay or which were within the affiant's own knowledge," the Commissioner was compelled to conclude "that the entire affidavit was based on hearsay" (R. 33).

We submit that the court's conclusion that Mazaka's affidavit related only hearsay was plainly erroneous. Unquestionably, some of the information contained in the affidavit was hearsay, for the investigation described by Mazaka involved a number of Investigators in addition to Mazaka, who reported their findings to him. However, there is simply no basis for conclusively assuming on this basis—in the face of Mazaka's sworn assertions that the relevant information was in part based "upon observations made by

tions Mazaka made personally and which were reported to him by others, it was appropriate to consider whether there was substantial basis for crediting the reports of others upon which Mazaka's affidavit may have essentially been based. We firmly disagree, however, with the court's finding that there was no such basis in this case, for it seems to us that Mazaka's affidavit clearly demonstrates that the reports of others (which it incorporated) were reports of observations made by other Investigators of the Alcohol and Tobacco Tax Division of the Internal Revenue Service assigned with Mazaka to the investigation of Ventresca's activity.

As previously noted, Mazaka swore that, insofar as the affidavit was not based upon his own observations, it was "based upon information received officially from other Investigators attached to the Alcohol and Tobacco Tax Division assigned to this investigation, and reports orally made to me describing the results of their observations and investigation." R. 5.) At another point, Mazaka swore that his information was "based upon personal knowledge and information which has been obtained from Investigators of the Alcohol and Tobacco Tax Division * * * who have been assigned to this investigation." (R. 8.) This language can only be read as meaning that, insofar as Mazaka himself did not report his own observations, he related information given him, either orally or in writing, by other Investigators of the Division. Observations of fellow officers engaged in a single investigation are plainly a reliable basis for a warrant applied for by

me" and "upon personal knowledge,"[1]—that *all* of the affidavit was therefore hearsay. Although the precise extent of Mazaka's participation in the investigation is unknown, it is clear that at least *some* of the reported observations were made by him.

3. Beyond this, the conclusion of the court of appeals that the entire affidavit was based upon information gathered in the first instance by Investigators other than Mazaka, did not alone compel it to find the affidavit insufficient. The court correctly held that, even though the entire basis of the affidavit might have been hearsay, the affidavit would still be sufficient "so long as a substantial basis for crediting the hearsay is presented." *Jones* v. *United States*, 362 U.S. 257, 269. We agree that since the affidavit did not make clear which of the relevant observa-

[1] The court construed Mazaka's statement that the "foregoing information is based upon personal knowledge and information which has been obtained from Investigators * * * who have been assigned to this investigation" (R. 8) as meaning "that such 'personal knowledge and information' was obtained [entirely] from other Investigators" (R. 33.) Thus, in the court's view, Mazaka swore that the "personal knowledge" *and* the "information" were *both* obtained from others—neither was attributable to Mazaka himself. The court of appeals' interpretation seems clearly wrong on two accounts: (1) At the beginning of his statement, Mazaka swore that the application for a warrant was "[b]ased upon observations made by me, and based upon information received officially from other Investigators * * *." Thus Mazaka made it entirely explicit that some "personal knowledge" was his. (2) The court's interpretation is ungrammatical. If Mazaka had meant to say that he received both the "personal knowledge" and the "information" from other Investigators, he would have said that "the foregoing information is based upon personal knowledge and information which *have* been obtained from Investigators * * *."

one of their number.[4] *Chin Kay* v. *United States*, 311 F. 2d 317, 320 (C.A. 9); *United States* v. *McCormick*, 309 F. 2d 367, 372 (C.A. 7), certiorari denied, 372 U.S. 911; *Weise* v. *United States*, 251 F. 2d 867, 868 (C.A. 9), certiorari denied, 357 U.S. 936; *United States* v. *Bianco*, 189 F. 2d 716, 719 (C.A. 3); see *Monnette* v. *United States*, 299 F. 2d 847, 850 (C.A. 5); *United States* v. *Li Fat Tong*, 152 F. 2d 650, 652 (C.A. 2). In *Rugendorf* v. *United States*, 376 U.S. 528, this Court held an affidavit sufficient where the only bases for its issuance were reports from F.B.I. agents and information from a confidential informant. The present case is even stronger. At least some of the relevant observations here were, as we have shown, observations made by Mazaka himself, and this personal knowledge of the affiant lent credence to reports of other Investigators received by him and related in the affidavit. Nor is it important that the Investigators making each observation were not named and the information attributable to each speci-

[4] The court below noted that in the case of *United States* v. *Pearce*, 275 F. 2d 318 (C.A. 7), "it was held that an affidavit based on hearsay relayed from one federal agent to another was insufficient." (R. 35.) There, the affidavit averred the receipt of "confidential information, from a source which in the past has proved reliable." On a hearing involving the asserted falsity of the affidavit, it was disclosed that the information "was not only relayed three or four times from one agent to another but when the source which in the past had 'proved reliable' was finally divulged it was found to be a stranger previously unknown to any member of the relay team" (275 F. 2d at 321, 323). It is apparent that the decision holding the affidavit insufficient rested on the misstatement of fact in the affidavit, not on the fact that the information in the affidavit had been communicated between officers.

fied.[5] See *United States* v. *McCormick*, 309 F. 2d 367 (C.A. 7), certiorari denied, 372 U.S. 911. The "knowledge of each was the knowledge of all." *United States* v. *Romero*, 249 F. 2d 371, 374 (C.A. 2). Even non-official informants ordinarily need not be identified. *Rugendorf* v. *United States*, 376 U.S. 528; *Jones* v. *United States*, 362 U.S. 257.

The court of appeals, while agreeing that Mazaka's information clearly came from other Investigators of the Alcohol and Tobacco Tax Division, did not, however, agree that the affidavit showed that these Investigators necessarily related first-hand information. Instead, the court found a "distinct possibility of hearsay-upon-hearsay," (R. 35) *i.e.*, the information reported to Mazaka may have been gathered, not through personal observation, but through outside informants of uncertain reliability. On the basis of this speculation, the court held the entire affidavit unreliable.

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[5] The case of *DiBella* v. *United States*, 284 F. 2d 897 (C.A. 2), judgment vacated and appeal dismissed on procedural grounds, 369 U.S. 121, cited by the court below (R. 36) and by respondent (Brief in Opp. to Cert., pp. 6–7), is inapposite. There, a complaint was found insufficient to support an arrest warrant under Rule 5(a), F. R. Crim. P., where it recited generally that the relevant information and belief was based not only upon observations of the affiant and reports of the Bureau of Narcotics, but upon statements of "other witnesses." Unlike the present case, the detailed factual basis for the affiant's belief was not set forth—the complaint included only the conclusory charge and the above general averment of sources. Significantly, in the same case, affidavits which did set forth facts gathered by the affiant, unnamed "other witnesses," and unnamed "Agents of the Bureau of Narcotics," were held sufficient to demonstrate probable cause.

The assumption of the court of appeals that all of the information in Mazaka's affidavit may in fact have come from unreliable informants is without foundation. The detailed observations recounted in the affidavit cannot fairly be regarded as having been made in any major part by persons other than full time Investigators of the Alcohol and Tobacco Tax Division of the Internal Revenue Service. It is apparent from the events described in the affidavit that the investigation of Ventresca's premises was not one in which informants would normally be engaged. The investigation was an organized month-long surveillance participated in by several persons. It involved surreptitious glances through the windows of a parked automobile, repeated night-time walks on a public sidewalk past Ventresca's residence, observations at other places, and the surveillance of moving automobiles in Worcester and between Boston and Worcester. None of the repeated observations were made from a vantage point which would have been peculiar to a confederate; all appeared, to the contrary, to be the product of clandestine investigations for which Investigators are specially trained. While information from private informants may have been used as a starting point for the investigation, it is wholly unreasonable to suppose that this detailed investigation in itself was entirely or even principally delegated to such persons. The existence of private informants is not suggested in any way whatsoever by Mazaka's affidavit. Therefore, to conclude not only that such informants existed, but that they were the

sole or even the primary source of the information related in the affidavit, was unwarranted.

However, even if it could be assumed that Mazaka's affidavit contained some observations made by other informants, that information, communicated through Investigators of the Division, would nevertheless be entitled to credence even in the absence of any identification or description of the informers. The known trustworthiness of an informant is not the sole means of crediting his information. Corroboration of his story by independent evidence is an accepted, even preferable, means of assuring verity. If we are correct in believing that at least some of the observations related in the affidavit were unquestionably made by official Investigators, these observations would have corroborated similar observations of suspicious activities reported by private informers. See *United States* v. *Woodson,* 303 F. 2d 49 (C.A. 6), certiorari denied *sub nom. Grant* v. *United States,* 373 U.S. 941. For example, observations on any occasion by Investigators of the delivery of empty five-gallon cans and numerous sixty-pound bags of sugar to Ventresca's residence would provide a basis to give credence to similar reported observations by others. Finally and conclusively, even if it be assumed that the court of appeals was correct in regarding *all* the observations which were not specified as to source as having been made by unreliable private informants, there is no way to avoid the fact that the affidavit specifically credited the detection of the distinctive odor of fermenting mash coming from Ventresca's residence to Investigators of the Internal Revenue Service. Since this evidence alone was suffi-

cient to establish probable cause, see p. 10, *supra*, the warrant had a sufficient basis.*

In sum, no matter how hypertechnical an approach is employed, Mazaka's affidavit established probable cause. Given any fair reading, its sufficiency was manifest.

II

AN UNDULY NEGATIVE ATTITUDE TOWARD INTERPRETING APPLICATIONS FOR SEARCH WARRANTS—EXEMPLIFIED IN THE APPROACH OF THE COURT BELOW—WILL TEND TO DEFEAT THE OBJECTIVES OF THE FOURTH AMENDMENT

We have demonstrated that any fair interpretation of the application for the warrant in this case shows facts establishing probable cause. The court of appeals reached the opposite result only by reading the application, like a common-law pleading, wholly against the purposes of the document. Thus the court placed upon the affiant the burden to negate every inference which might defeat a finding of probable cause. For example, after correctly stating that the affidavit revealed that not all of the observations recited in it were personally made by affiant Mazaka, the court detected that the affidavit nowhere specified which observations Mazaka made and which were made by others. From this the court reached the unwarranted conclusion that the "Commissioner could only

* To the extent (as suggested in the concurring opinion below at R. 37) that the decision holds that the affidavit will fall if some of its averments are by themselves uncredited and insufficient to support the warrant, it is incorrect. If an affidavit contains any facts sufficient to establish probable cause, the warrant will be upheld. *Chin Kay* v. *United States*, 311 F. 2d 317, 321–322 (C.A. 9); *Clay* v. *United States*, 246 F. 2d 298, 304 (C.A. 5), certiorari denied, 355 U.S. 863.

conclude that the entire affidavit was based on hearsay" (R. 33). That is, since Mazaka did not say which observations were not hearsay, the affidavit was construed to contain only hearsay, to the exclusion of all other evidence. This despite Mazaka's explicit sworn statement that he had in fact made some of the relevant observations himself.

In a construction even more vital to the case, the court treated the affidavit as saying that none of the observations reported by the Investigators were based upon their personal knowledge or observation of the facts, but came, instead, from unreliable informants nowhere mentioned in the application. The basis of this holding was that Mazaka had not explicitly stated that any particular portion of the investigation was undertaken first-hand by Investigators, and that he had sworn in one place that the affidavit was based upon "information which has been obtained from Investigators" (R. 8). The court construed the latter statement as permitting the inference that none of the Investigator's information was "first-hand"—since it did not say otherwise (R. 35)—and that the second-hand information was unreliable—since Mazaka, who did not mention informants other than Investigators, obviously did not show their reliability. The interpretation in this instance was even more remarkable (1) because Mazaka had specifically sworn that two crucial observations—those detecting the odor of fermenting mash—had indeed been made by "Investigators," and (2) because Mazaka had generally sworn at the outset of his description that the affidavit contained "the results of their [the Investigator's] observations and investigation" (R. 5). Thus not only were the

most negative interpretations of ambiguities adopted, but such interpretations were adopted even as against explicit affirmative statements to the contrary elsewhere in the affidavit.

We have tried to show that, even laboring under the strictest possible rules of construction, the affidavit here sufficiently established probable cause. Whether the particular affidavit in this case justified a warrant is, however, of no general importance. What *is* important is the attitude with which courts will approach the interpretation of affidavits seeking warrants. More is involved than merely the incongruity of applying hypertechnical requirements of clarity and explicitness against documents which are normally drafted quickly by nonlawyers in the midst of a criminal investigation. That consideration alone would strongly counsel against the attitude of the court of appeals. Much more significant, however, it should be evident that a grudging or negative attitude toward applications for warrants—finding unintended ambiguities and construing them to defeat the obvious meaning of the application—will have a direct and harmful bearing upon the due enforcement of the safeguards embodied in the Fourth Amendment. The constitutional policy of closely regulating searches and seizures, expressed in the rule that they be undertaken only with respect to specific objects and only upon probable cause, clearly favors procedures whereby police act pursuant to warrants rather than upon their own judgment that probable cause exists. Although there are limited exceptions to the requirement that searches be undertaken only after a warrant

has been obtained,' this Court has therefore frequently stressed the desirability of having officers, where possible, submit the facts which they deem to justify an invasion of privacy to the impartial decision of a Commissioner or judge before they act. *Aguilar* v. *Texas,* 378 U.S. 108, 111; *Chapman* v. *United States,* 365 U.S. 610; *Jones* v. *United States,* 362 U.S. 257; *Johnson* v. *United States,* 333 U.S. 10; *McDonald* v. *United States,* 335 U.S. 451; *United States* v. *Lefkowitz,* 285 U.S. 452. Not only does such a procedure tend to minimize unnecessary invasions of privacy, but police are apt to act more responsibly, and there is less likely to be resentment against their intrusion, when they act under the warrant of an impartial officer specifically describing the place to be searched and the thing or things to be seized. Indeed, in two recent cases similar in many respects to the present case, the Court has explicitly criticized hasty action by officers who spontaneously invaded premises without a warrant on the basis of telltale odors, indicating that the proper course would have been to obtain a warrant, as the Investigators did here. *Johnson* v. *United States, supra; Chapman* v. *United States, supra.*

The decision of the court of appeals in this case stands squarely against the preference thus accorded

[7] Investigators such as those involved in this case are authorized to arrest without a warrant for any offense committed in their presence or for any felony they have reasonable grounds to believe has been committed (26 U.S.C. 7608(3)). As incident to that arrest, a search of the immediate premises may be made. *United States* v. *Rabinowitz,* 339 U.S. 56; *Harris* v. *United States,* 331 U.S. 145. See *Abel* v. *United States,* 362 U.S. 217, 235.

to police action taken under a warrant. Should it become evident that affidavits supporting applications for warrants will, as here, be subjected after the fact to unduly restrictive interpretations, the inevitable effect would be to discourage investigators from submitting their evidence to a judge or Commissioner before acting. If a basis for action without a warrant existed, investigators in possession of facts which they know to establish probable cause would naturally tend to favor that course rather than hazard the risk that an hypercritical eye might find a flaw in the warrant and thus set the entire investigation at naught. In cases where an officer acts without a warrant, should ambiguities arise in his testimony at the hearing where he is called upon to show probable cause, a government attorney is present to draw out all the details which supported the action and to resolve the ambiguities on the spot, rather than having them unfailingly resolved against the officer, as in the present case.

In a very similar situation, this Court, in *Jones* v. *United States*, 362 U.S. 257, 270–271, was careful to insure that the requirements for obtaining a valid warrant would not thus be made more strict that the requirements for acting without a warrant. In *Jones*, the question was whether hearsay could support a warrant, where it had already been held that similar hearsay could support police action without a warrant. The Court said:

> If evidence of a more judicially competent or persuasive character than would have justified an officer in acting on his own without a warrant must be presented when a warrant is

> sought, warrants would seldom legitimatize police conduct, and resort to them would ultimately be discouraged. Due regard for the safeguards governing arrests and searches counsels the contrary. In a doubtful case, when the officer does not have clearly convincing evidence of the immediate need to search, it is most important that resort be had to a warrant, so that the evidence in the possession of the police may be weighed by an independent judicial officer, whose decision, not that of the police, may govern whether liberty or privacy is to be invaded.

Similarly, in this case, we submit that the Court should make it clear that the requirements for acting pursuant to a warrant will not be made so technical and restrictive that "resort to them would ultimately be discouraged." We do not suggest that the Court give its blessing to scanty affidavits which, through conclusory assertions and an absence of specificity, might well conceal an absence of probable cause. Read fairly, the affidavits presented in the application for a warrant must show probable cause to believe specific facts upon which an inference of guilt can be based. *E.g., Aguilar* v. *Texas,* 378 U.S. 108, 114. Here, that standard was fully satisfied. The officers conducted a lengthy and thorough investigation and, before acting to invade privacy, they procured a warrant on the basis of detailed allegations indicating guilt. Where officers thus follow the course best designed to safeguard the constitutional interest in preserving individual freedom from unnecessary or arbitrary searches, it would defeat the ends of justice to frustrate their efforts through pleading

requirements which ignore the care with which the officers proceeded.[8]

CONCLUSION

For the reasons stated, it is respectfully submitted that this Court should reverse the judgment of the court below.

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[8] In addition, the holding below failed to give proper weight to the finding of the Commissioner, to whom the application for search warrant was presented, who made a determination that the facts detailed in the affidavit disclosed probable cause for issuance of the warrant (R. 9). Had he found ambiguities in the warrant, technical or otherwise, they could have been corrected then. It is therefore not appropriate for an appellate court, after the warrant has been issued, to determine whether through any arguable interpretation of the language which the Commissioner did not adopt, he could possibly have found that the affidavit was not sufficient. The judgment of the Commissioner should be sustained if it is reasonably justified under an appropriate interpretation of the affidavit. *E.g.*, *Irby* v. *United States*, 314 F. 2d 251, 253 (C.A.D.C.), certiorari denied, 374 U.S. 842; *United States* v. *Nicholson*, 303 F. 2d 330, 332 (C.A. 6), certiorari denied, 371 U.S. 823; *United States* v. *Spears*, 287 F. 2d 7, 9–10 (C.A. 6); *United States* v. *Ramirez*, 279 F. 2d 712, 716 (C.A. 2). It does not matter that he "might have found the affidavit insufficient and withheld his warrant." *Jones* v. *United States*, 362 U.S. 257, 271.

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